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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1982

Dale and Carol Sweatt,
Petitioners
vs.) Docket No.
Plumbago Mining Corporation,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME JUDICIAL COURT
OF THE
STATE OF MAINE

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QUESTION PRESENTED

If property is seized in violation of the United States Constitution, and if the seizure was made possible only by concerted action by the police and an adverse civil claimant to the property, should United States v. Janis be extended to authorize the claimant's attachment of the property ?

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JURISDICTION

The question on this Petition is presented by the decision of the Maine Supreme Judicial Court rendered on April 21, 1982 in Plumbago v. Sweatt, appended to this Petition as Exhibit A. Review in this Court is founded on 28 U.S.C. §1257(3). Reconsideration has been denied and a stay pending this Petition was denied on May 11, 1982.

STATEMENT OF THE CASE

In October and November of 1980, the Maine State Police conducted six searches of Dale and Carol Sweatt's home, office, bank vault, tenant's store and attorney's office and files. The Sweatts immediately moved to suppress and return, on the ground that the warrant lacked probable cause. The twenty four page affidavit by Trooper Carter consisted of un-

confirmed double and triple hearsay received from Carter's long-time friend Dean McCrillis, President of Respondent Plumbago Mining Corporation. The property seized was tourmaline, which McCrillis claimed Dale Sweatt had embezzled from Plumbago five years earlier. The Maine Supreme Judicial Court found for the Sweatts and ordered the Sweatts' tourmaline returned. State v. Sweatt, 427 A.2d 940(1981).

In the interim, however, Plumbago had attached the tourmaline in a civil action. The Sweatts thus sought release of the attachment in the Superior Court. They relied on the Supreme Court order and, independently, on the principle that Plumbago should not be allowed to profit from its invasion of the Sweatts' Fourth Amendment rights. The Superior Court accepted both arguments, concluding that

Plumbago should not have a "one hundred yard start." The tourmaline was in fact returned on May 19, 1981.

Nearly one year later, the Maine Supreme Judicial Court ordered the Sweatts to give their tourmaline back to the Sheriff who had attached it while in the hands of the State Police. The opinion of April 21, 1982 rejected both of the Sweatts' arguments. The Court held that Plumbago's misconduct was irrelevant because return of property would not deter illegality. It also held that the trial court should not have relied upon the Supreme Court's earlier order of return. The Maine Supreme Court then concluded - despite Plumbago's illegality - that "It is only fair and equitable that the parties be returned to the status which existed immediately prior to the order vacating the attachment."

The federal question described earlier was thus properly and timely raised in the Superior and Supreme Courts of Maine. Jurisdiction of this Court would be proper upon a writ of certiorari. Since Plumbago's conversion action may proceed against the Sweatts, a stay of the Maine Supreme Court's latest order would avoid mootness.

ARGUMENT

PLUMBAGO SHOULD NOT BE ALLOWED TO PROFIT FROM THE ILLEGALITY IT PROCURED

The trial court held Plumbago could not have a "one hundred yard head start" in attaching the Sweatts' property. The Supreme Court reversed, citing only United States v. Janis, 428 U.S. 433 (1976). But this case is not concerned with the exclusionary rule under Mapp v. Ohio, 367 U.S. 433(1976). The question

instead is whether a civil claimant may use state police for improper ends and nevertheless - after an unconstitutional search - benefit from the fruits. The answer must be no.

Plumbago simply can not be rewarded for inducing unconstitutional misconduct. Constitutionally, the Sweatts must have a remedy for the unconstitutional attachment of their property. Damages are clearly available. Bivens v. Six Unknown Agents, 367 U.S. 433(1976); Monroe v. Pape, 365 U.S. 167(1961). Release of the attachment should also be available. The Maine Supreme Court disagreed, on the ground that release would not deter police. But in a case such as this that conclusion seems clearly wrong. Moreover, deterrence is not a controlling factor when, as here, there are no criminal charges and hence no attempt to exclude evidence.

The Court below thus erred in relying on United States v. Janis, 428 U.S. 433 (1976). This case is not concerned with exclusion of evidence, but with relief for the injury sustained by the Sweatts.

Janis is inapposite also because this case involves not only a criminal seizure but also a civil attachment. Both implicate the State, one through the police and one through the sheriff. Both the Fourth and Fourteenth Amendments were affronted, since Due Process prohibits prejudgment seizures which deny basic concepts of fair play. Fuentes v. Shevin, 407 U.S. 67(1972); Mitchell v. W.T. Grant, 416 U.S. 600(1974). In effect, the state police seizure was a criminal attachment setting up a civil attachment, infringing the Sweatts' rights to both due process and reasonable searches and seizure.

This is a case of extraordinary abuse of official power. McCrillis manipulated the police in a manner later held unconstitutional by the Maine Supreme Judical Court. The police illegality led to seizure of the Sweatts' tourmaline. Plumbago's subsequent discovery and attachment of the Sweatts' tourmaline were made possible only by that seizure. This is thus not a case of a mere windfall.

This case is also extraordinary because the Sweatts sought pre-trial relief from constitutional abuses, and they did so against concerted official and private misconduct. The precise issue has not previously been before this Court, perhaps because it has never previously been so clearly presented and preserved in a lower court. The Sweatts proceeded by motion to suppress and return, producing one Maine Supreme Court opinion invali-

dating the police search, followed by a subsequent opinion upholding Plumbago's attachment. The Question Presented is thus neatly bracketed for decision by this Court.

This question is of importance to many litigants other than Dale and Carol Sweatt. Use and abuse of criminal processes in furtherance of civil cases is commonplace. If search warrants may be employed in tandem with attachments in the full range of civil litigation, the Fourth and Fourteenth Amendments are in serious jeopardy. That jeopardy is a matter of particular concern when the fruits of illegal searches are laundered through civil attachments and citizens are subject not only to illegal invasions but illegal coercion. Ironically, the Sweatts are now under an order to return the very property restored to them after

the illegal seizures: they must now cooperate in the invasion of their own rights.

The Fourth and Fourteenth Amendments were intended to prevent just such a result. Both are implicated by the combined civil/criminal nature of this case. This lends special urgency to this case and is a context long familiar to this Court. See Boyd v. United States, 116 U.S. 616(1886); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693(1965); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). Nevertheless, the precise questions raised by Petitioners have not previously been resolved by this Court. They are important; they were fully raised below; they will be fully developed before this Court.

This Court's Review is timely now, since issues concerning prejudgment at-

tachment may be mooted by a final judgment. Moreover, the Maine Supreme Judicial Court refused to reconsider its order of reversal and denied a remand for the Sweatts to develop Plumbago's illegality more fully. Thus, the decision below is final for the purposes of this litigation and will have a profound impact on the future course of the litigation, as well as on the Sweatts' constitutional rights.

Respectfully submitted,
Counsel for Petitioners

May 28, 1982

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APPENDIX AND
OPINION BELOW FOR REVIEW

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 2931
Law Docket No. Law-81-203
Law Docket No. Law-81-192

PLUMBAGO MINING CORPORATION

v.

DALE SWEATT, et al

STATE OF MAINE

v.

DALE SWEATT and CAROL SWEATT

Argued November 18, 1981

Decided April 21, 1982

Before: McKUSICK, C.J., and GODFREY, NICHOLS, ROBERTS, CARTER, VIOLETTE, JJ and DUFRESNE, ARJ

VIOLLETTE, J.

In these two appeals, this Court is presented with an issue of first impression: the appropriate disposition of property illegally seized from the defendants in a criminal prosecution (Dale and Carol Sweatt) which, in two pending civil actions, is claimed to have been stolen from its

alleged rightful owner (Plumbago Mining Corporation). We hold that under the unique circumstances of these cases the Superior Court erred in ordering, on the authority of our mandate in State v. Sweatt, Me., 427 A.2d 940 (1981), the property returned to the defendants, and victims of the illegal search and seizure, Dale and Carol Sweatt.

On appeal, Plaintiff Plumbago alleges error in two of the Superior Court's orders entered in State v. Sweatt after remand from this Court. Plumbago argues that the Superior Court erred in ordering the State, through its police officers who had custody of the seized property (tourmalines), to return the property to the Sweatts. The Superior Court denied Plumbago's motion to intervene as a third party claimant or to appear as amicus curiae in the criminal case, and Plumbago

assigns error to this ruling. We affirm that ruling, entered in State v. Sweatt, Me., 427 A.2d 940 (1981).

Plumbago also appeals from a Superior Court order entered in two cases titled Plumbago Mining Corp. v. Dale Sweatt, et al, which have been consolidated on appeal. Two civil actions were commenced by plaintiff: a forcible entry and detainer action for personal property commenced pursuant to 14 M.R.S.A. §6012 (1980) [hereinafter referred to as the FED action] and an action seeking damages and an accounting for conversion, breach of fiduciary duty, breach of contract, and violation of 14 M.R.S.A. §3155 (1980) [hereinafter referred to as the conversion action]. Defendant Dale Sweatt has moved to dismiss the appeals. Because we find that this appeal is not moot and is within an exception to the final judgment rule, we

deny defendant's motion to dismiss the appeal.

I. PROCEDURAL HISTORY

A. State v. Sweatt

On March 30, 1981, this Court held that various tourmaline gems had been illegally seized from the defendants, Dale and Carol Sweatt. State v. Sweatt, Me., 427 A.2d 940 (1981). Acting upon search warrants, police officers had seized tourmalines found at the Sweatts' home, Dale Sweatt's office and bank vault, a retail store that sold the gems on consignment, and a safe which was co-owned by the Sweatts and their attorney and located in that attorney's office. On November 26, 1980, a Superior Court justice, following a hearing, ordered suppression of part of the seized property and ordered it returned to the defendants

pursuant to M.R.Crim.P. 41 (e).[1] He denied suppression of the remainder of the seized property. In deciding that the Superior Court had properly granted part of defendants' motion to suppress and improperly denied the remainder of the motion, the Court stated that "where the suppressed evidence is neither contraband by force or law nor stolen property nor evidence of a crime, it must be returned to the movant absent an adverse claim of ownership." Id. at 951. The Court expressly

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1. Maine Rule of Criminal Procedure 41(e) reads in pertinent part:

> A person aggrieved by an unlawful search and seizure may move the Superior Court in the county in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained. . . . If the motion is granted the property shall be restored unless otherwise subject to lawful detention. . . .

noted that "no third-party claim has been advanced." Id. The mandate of the Law Court was "Remanded for entry of an order suppressing all property seized and directing its prompt return to the movants." Id.

The State moved for a rehearing of the appeal on April 13, 1981, claiming that the District Attorney was left "in a state of doubt and confusion as to her responsibilities with respect to this property" since there existed pending civil claims. Counsel for the defendants submitted a letter to the court explaining the issues and opposing the State's motion. The motion was denied without an opinion on April 21, 1981.

Plumbago's participation in State v. Sweatt was quite limited prior to the issuance of the Court's decision since it was not a party to the criminal case.

Only the defendants' counsel and the District Attorney participated in the suppression hearing. However, counsel for Plumbago did address the hearing court briefly on the question of the tourmalines' disposition should the court grant the suppression motion. The presiding justice noted that this was not a civil action and that the suppression issue was the only matter before the court; "If there are civil suits pending or contemplating attorneys would do well if they think it feasible to protect themselves as--attachment of [sic] trustee process."

After this Court's opinion and mandate were issued, Plumbago moved on April 10, 1981, to intervene as a third-party claimant or to appear as amicus curiae in the criminal case on remand. It also moved for a stay of the November 26, 1980, Superior Court order returning the seized

tourmaline to the Sweatts. Both motions were denied on April 29, 1981, following the issuance of an order by a Superior Court Justice on April 27, 1981, implementing the mandate of the Law Court directing the return of the tourmalines to the Sweatts. In the criminal case, Plumbago has timely appealed from the denial of its motions to intervene and for a stay, and from the April 27, 1981 order.

B. The Civil Case

Plumbago's appeal focuses on the property of a Superior Court order issued in both civil cases on May 15, 1981. Prior to that date, the FED and conversion actions had been treated separately by the parties[2] and the courts. At the time

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2. The State Police Officers, Troopers White and Ouellette, who seized the tourmalines in the State v. Sweatt prosecution, were named as defendants in the FED action, and defendant's former attorney, David Austin, was named as a defendant in both civil actions. These parties have not filed briefs in this appeal.

this appeal was taken, neither case had reached the pre-trial stage, and so no decision on the merits of Plumbago's claim that Dale Sweatt stole the tourmaline from the corporation has been made.

1. The FED Action

The FED action was commenced in District Court (Rumford) on November 20, 1980. On the same date, plaintiff also filed a motion for a temporary restraining order seeking to restrain the state troopers, who had custody of the tourmalines at that time, from releasing the gems to anyone "pending the outcome of this litigation" which motion was granted

following a hearing.[3] A subsequent motion to dismiss the action filed by Sweatt was denied, the judge having found that plaintiff's pleadings were proper and sufficient and that the FED action was not in conflict with the Superior Court criminal case.

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3. The order read:

> After hearing the arguments of counsel and reviewing the affidavits of Dean McCrillis and Robert Mittel and reviewing and remaining pleadings, it is ORDERED, ADJUDGED AND DECREED THAT, if Superior Court in Oxford County Cr. No. CR 80-291 should order the tourmaline in question suppressed and released neither Def. White or Def. Ouellette or any person acting under or for them shall take any action to release to any person, until the conclusion of this proceeding any of the tourmaline seized by the Maine State Police . . . from Def. Sweatt or Austin.

A "consent judgment"[3.5] was rendered by the District Court on January 15, 1981, which read in pertinent part that, "by agreement of counsel,"

> Defendant White and Ouellette [the state troopers who had custody of the gems] have no right, title or interest in the property in question other than as custodians. They shall retain the property in question until any pending criminal proceedings involving defendants Sweatt or Austin have terminated in the Superior Court. If this civil action is pending at that time they shall continue to hold it until the entry of any final judgment.

3.5 While we consider the "judgment" entered by the District Court Judge on January 15, 1981, to be an order by consent of the parties and not a final judgment and we shall accordingly treat it as such for the purpose of this opinion, we shall nonetheless refer to it as a "consent judgment" since that term clearly identifies the ruling in distinction from the numerous other orders addressed.

A complaint was entered in Superior Court, Oxford County, on February 26, 1981, pursuant to 14 M.R.S.A. §6012.[4] On March 30, 1981, the State v. Sweatt opinion was issued. One month later defendants White and Ouellette moved to vacate the November 20 order granting a temporary restraining order and to modify the January 15 judgment so that they could turn over the gems to Sweatt, as required by the April 27, 1981, order entered in State v. Sweatt by the Superior Court, Oxford County, without violating the orders issued in the FED action. On May 15, 1981, defendant Sweatt's motion to dissolve the temporary restraining order was granted by the Superior Court, Oxford County, which held that the Law Court mandate ordering

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4. 14 M.R.S.A. §6012 states: "there shall be no right of removal, except if the defendant shall claim title to said property himself."

the return of the tourmaline to the Sweatts controlled the disposition of the gems.

2. The Conversion Action

Plumbago commenced the conversion action in Superior Court, Oxford County, on December 15, 1980, about one month after commencement of the FED action. Plaintiff moved on January 19, 1981, for approval of an attachment and trustee process "against the property of defendants Sweatt and Austin in an amount of $1,500,000." Affidavits of Dean McCrillis, the President of Plubago, and others were submitted to show that plaintiff had a reasonable likelihood of recovering judgment and that the judgment would probably exceed the limits of defendant's liability insurance, as required by M.R.Civ.P. 4A. On April 17, 1981, a Superior Court Justice ordered that " an attachment

including an attachment on trustee process, may be made against Dale Sweatt's property in the amount of $1,000,000." A writ of attachment was issued on April 24, and on April 27 at 9:10 a.m. a Cumberland County deputy sheriff attached "a black footlocker and its contents" [hereinafter referred to as the tourmalines] which were being held by Eagle Savings and Loan Association in an account in the names of the state troopers who had seized the tourmalines. The attaching deputy sheriff subsequently appointed Eagle Savings keeper of the gems. 14 M.R.S.A. §4152 (1980). On April 29 the bank refused to give Sweatt the footlocker when he attempted to obtain possession pursuant to the April 27 order of the Superior Court in the criminal action.

The State of Maine moved to dissolve the writ of attachment on May 1, 1981, on

the grounds that the property was deposited into the account of the two state troopers who were ordered by a Superior Court Justice on April 27 to return the evidence to the Sweatts and were prevented from doing so by the attachment. Defendant Sweatt also moved to release the attachment. On May 15, 1981, a justice of the Superior Court, Oxford County, entered an order dissolving the attachment and requiring the State to return the gems to the defendants.

3. Plaintiff's Appeal

Plaintiff, in Plumbago Mining Corp. v. Dale Sweatt et al, is appealing from the May 15 order entered in the FED and conversion actions. This order, issued after a hearing where all parties were

represented, reads as follows:[5]

> It is hereby ORDERED, that
>
> 1. The mandate of the Supreme Judicial Court of March 30, 1981 be promptly carried out pursuant to the April 27, 1981 order of this Court at [State v. Sweatt] that "the State acting through its officers is hereby ordered to promptly return" all property seized in this action to Dale and Carol Sweatt;
>
> 2. The order in [the FED action] dated November 20, 1980 and January 15, 1981 entered against the State and Officers White and Ouellette insofar as it deals with the subject property is hereby dissolved and said officers are directed to proceed forthwith to enforce the mandate of the Supreme Court and this Court;
>
> 3. The attachment [in the conversion action] entered by Plaintiff Plumbago through Sheriff Fulton of Cumberland County against a footlocker and its contents in the Eagle Savings and Loan Association of Portland, Acct. 000087, is hereby dissolved, released and declared of no effect, and the State is

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5. Plaintiff's request to the Superior Court for a stay of this order was denied.

> hereby directed to proceed forthwith to retake possession of that footlocker, and Eagle Savings and Loan or the Cumberland County Sheriff is directed to turn over that footlocker and contents immediately upon demand.
>
> 4. This Order shall be the final Order of this Court [in the criminal case], implementing the mandate of the Supreme Judicial Court of March 30, 1981, and all parties--the State, the State Police, Plumbago Mining Corporation, Eagle Savings and Loan, the Cumberland County Sheriff, and any other party whatsoever is hereby enjoined from interfering in any way with that mandate--to return all property illegally seized to Dale and Carol Sweatt.

This order was issued on a Friday afternoon. The following Monday, May 18, 1981, plaintiff, in the Supreme Judicial Court, sought a stay of the order pending an appeal.

On May 19, at either 8:30 a.m. or 11:30 a.m., the Superior Court clerk docketed the notices of appeal in the two civil cases. Later that day, the state

troopers, acting in compliance with the May 15 order, collected the gems and the footlocker from the keeper and delivered them to the Sweatts. On May 22, the Law Court granted plaintiff's motion for a stay of the order dissolving the attachment, temporary restraining order and consent judgment in the two civil actions. Plaintiff's subsequent motion for further relief, requesting an order directing the defendants to place the gems into custody of the state police, was denied.

II. INTERVENTION IN THE CRIMINAL ACTION

Plaintiff argues on appeal that it should have been permitted to intervene in the criminal proceedings on remand in order to protect its interests in the tourmalines. These proceedings consisted of the entry of an order in accordance with the mandate of State v. Sweatt, supra.

The court below ruled that the plaintiff had no right to intervene in a criminal proceeding.

Our Rules of Criminal Procedure do not provide for intervention in criminal cases. Plaintiff proposes that the standards and procedures for intervention contained in M.R.Civ.P. 24 should apply to his motion, and asserts that his motion was timely and should have been granted as of right. We disagree. Rule 24 applies to civil proceedings only.

We also determine that intervention is not available to one who is not a party in a criminal proceeding, such as the case here, and who claims ownership rights to seized property which is the subject of a motion for return of property and to suppress evidence under the provisions of Maine Rule of Criminal Procedure 41(e) and who has instituted civil process to

establish his proprietory rights to the seized property. We do not decide the appropriateness of intervention in the absence of pending civil litigation. But cf. United States v. LaFatch, 565 F.2d 81 (6th Cir. 1977), cert. denied sub nom. LaFatch v. M.M. Corp., 435 U.S. 971 (1978) (court implicitly permitted intervention by alleged owner in proceeding initiated by defendant to recover suppressed property, where owner had obtained civil verdict against defendant).

III. MOOTNESS IN THE CIVIL ACTIONS

Defendant[6] argues on appeal that this case is moot because the May 15 order has been fully executed, the Sweatts now

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6. As Dale Sweatt was the only defendant who filed briefs and appeared at oral argument in the three actions before us, we will refer to him as "the defendant" throughout the remainder of this opinion.

have possession of the tourmalines, and the Law Court cannot order relief under such circumstances. He further asserts that in consequence of these events, "the stay granted by this court on May 22, 1981, could only maintain the status quo," namely, possession of the tourmalines by the Sweatts.

Although defendant has characterized his objection as a mootness question, his challenge is to the power of the Court to fashion a remedy. It is an established principle of equity that

> A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess. (Emphasis added)

Restatement of Restitution §74 (1937). "On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost." Bank of the United States v. Bank of Washington, 31 U.S. (6 Pet.) 8, 17 (1832).

The facts that the appeal had not been perfected and a stay had not been granted at the time the tourmalines were returned to the Sweatts do not render this appeal "mmot" for lack of a remedy. In Haebler v. Myers, 132 N.Y. 363 30 N.E. 963 (1892), the New York Court of Appeals was presented with a similar case. The plaintiff had obtained an attachment, which upon order or a state court was dissolved, and a sheriff returned the attached property to the defendant. The sheriff had acted while the court order was in full force.

Although on appeal the court had before it a judgment on the merits in favor of plaintiff, it stated that "[i]f the situation were the same as it was when the money [the attached property] was paid [i.e., returned to the defendants] , repayment to the sheriff would be required, because he would be entitled to possession of the fund under the restored attachment." Id. at 369, 30 N.E. at 965. The court inferred a promise of restitution because the defendants, when they accepted return of the attached property, "knew . . . that it might ultimately be decided that they were not entitled to it." Id. See also Atlantic Coast Line RR v. Florida, 295 U.S. 301, (1935); Silverman v. Lichtman, 296 So. 2nd 495 (Fla. App. 1974); Badigan v. Badigan, 290 NYS 2d 577, 30 A.D. 2d 522 (1968).

We conclude that this Court under its powers may order the tourmalines returned to the Deputy Sheriff of Cumberland County

who attached the property, should equity demand that the attachment be reinstated.

IV. APPEALABILITY

Defendant contends that there is no final judgment in the conversion action from which plaintiff may appeal. Defendant submits that the presiding justice merely "released" the tourmalines from the attachment and that this is a nonappealable interlocutory order. Whether or not the order "released" the tourmalines or vacated the attachment order, we find that plaintiff would suffer irreparable harm should the order stand since nothing of value remained attached. Plaintiff has lost the security for its judgment. Under these circumstances, the order "falls within the exception to the 'final judgment' rule and is immediately appealable" for the same reasons that an order denying or dissolving

an attachment is appealable. Northeast Investment Co. v. Leisure Living Communities, Inc., Me., 351 A.2d 854 (1976); Foisy v. Bishop, Me., 232 A.2d 797, 798 (1967). We note that the fact that the property released by the May 15 order may have had a value less than the total amount authorized to be attached by plaintiff is immaterial in considering the appealability of the order. Irreparable harm is as great where the plaintiff has not attached property equal to the amount authorized ($1,000,000) as where has has attached as much as possible.

Under the equitable powers granted to the District Court in 14 M.R.S.A. §6012, the court could validly grant plaintiff's motion for a temporary restraining order. In doing so, the court was bound to follow the provisions of M.R.Civ.P. 65 governing the issuance of injunctions in the absence

of any District Court rule governing the procedure for issuing an injunction. Rule 65 requires the court to fix a time for expiration of a temporary restraining order. The District Court failed to do so in this case. If the temporary restraining order did not expire prior to the issuance of the consent judgment due to the District Court's failure to specify an expiration date, it certainly did expire at the time the consent judgment was entered, on January 15, 1981. Therefore, we cannot consider plaintiff's appeal with respect to the temporary restraining order.

Defendant did not specifically challenge the finality of the consent judgment obtained in the FED action. Nevertheless, we will not consider an appeal unless the challenged order falls within a recognized exception to the final judgment rule. Where "substantial rights of a party will

be irreparably lost if review is delayed until final judgment," Moffett v. City of Portland, Me., 400 A.2d 340, 343 n.8 (1979), an appeal is allowed even in the absence of a final judgment. Our recent ruling in Connors v. International Harvester, Me., 437 A.2d 880 (1981), is particularly apt in this case and causes us to find that this appeal may be considered: "We conclude that this case, where the impact of the [consent judgment] is so similar to the impact of an attachment, is another such exception to the final judgment rule, and, so far as finality of judgment is concerned, we should follow the rule we announced in Moffett, supra." Id. at 881.

V. VALIDITY OF THE ATTACHMENT ORDER

Defendant seeks to uphold the order vacating the attachment by arguing that the original motion for an attachment

should not have been granted because the accompanying affidavits supporting the motion were insufficient. Although we find that the May 15 order was not based on alleged deficiencies in the attachment, we will consider defendant's assertions.

Defendant, in his motion to "release" the attachment, alleged numerous defects in the attachment. On appeal, he has raised only three objections: 1) that plaintiff's affidavits failed to prove, as required by M.R.Civ.P. 4A, likelihood of success on the merits of the amount which plaintiff could expect to recover and failed to allege that the affiants believed their statements to be true; 2) that the property Plumbago attached was actually in the custody of the State and therefore held by the Eagle Savings and Loan in violation of 14 M.R.S.A. §§8103, 8111 (1980); 3) that the writ was

not issued within 30 days of authorization.

Plaintiff submitted the following evidence which could have been considered by the presiding justice who granted the attachment on April 17: affidavits by the President of Plumbago stating his belief that Sweatt stole the tourmalines; affidavit indicating that Sweatt possessed some tourmaline and some "stuff" that was commonly known to be wrongfully taken tourmaline; an affidavit detailing the method by which tourmalines could have been stolen from the company by Sweatt; a search warranty; and evidence suggesting that the Newry mine tourmaline is unique and valuable. We conclude that the presiding justice's findings that plaintiff had proved a reasonable likelihood of success on the merits, that plaintiff had a reasonable possibility of recovery in the amount of $1,000,000.00 and that each

of the affidavits contained an oath by the affiant that he believed the statements made in the affidavits to be true, as required by our decision in Northeast Investment Co. v. Leisure Living Communities, Inc., Me. 351 A.2d 845, 854 (1976), were not clearly erroneous.

Defendant further argues that an attachment of "State" property is a violation of 14 M.R.S.A. §§8103, 8111. Even if the tourmalines could be considered "State" property after they were seized, which question we do not decide herein, the statutes relied on by defendant are not applicable to this case. Section 8103[7]

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7. 14 M.R.S.A. §8103 reads in pertinent part:

> 1. Immunity. Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages. When immunity is removed by this chapter, any claim for damages shall be brought in accordance with the terms of this chapter.

is not applicable because no governmental employees were sued in the conversion action, and section 8111, subsection 2,[8] merely forbids the use of attachment in negligence actions brought against governmental employees (i.e. troopers White and Ouellette). The complaint in the conversion action does not allege negligence and White and Ouellette were parties only in the FED action. Neither statute prohibits the attachment.

Under M.R.Civ.P. 4A(c), attachments "shall be made within 30 days after the

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8. 14 M.R.S.A. §8111 reads in pertinent part:

> 2. Attachment and trustee process. Attachment pursuant to Rule 4A, Maine Rules of Civil Procedure, and trustee process, pursuant to Rule 4B, Maine Rules of Civil Procedure, shall not be used in connection with the commencement of a civil action against an employee of a governmental entity based on a negligent act or omission of such employee in the course or scope of his duties.

order approving the writ of attachment." Defendant has challenged the timeliness of the April 24 attachment of the tourmalines. We find that plaintiff complied fully with the provisions of the rule, since the final order granting the attachment was issued on April 17, within 30 days of the making of the attachment.

VI. APPLICATION OF THE EXCLUSIONARY RULE

Defendant argues in his brief that Plumbago should not receive any relief on appeal because to do so would be to allow plaintiff "to reap the fruits of the poisonous tree it planted." The president of Plumbago, Dean McCrillis, supplied most of the information leading to the issuance of the search warrant which we hold to be improper in State v. Sweatt. Defendant contends that Plumbago has benefited from the unconstitutional seizure because it

had an opportunity to attach the tourmalines while they were held by the police, rather than at some time when defendant had control over the gems.[9]

In United States v. Janis, 428 U.S. 433, reh. denied 429 U.S. 874 (1976), the Supreme Court ruled that exclusion of evidence unlawfully seized by state police officers was not warranted in a federal tax collection proceeding because exclusion had not been shown "to have a sufficient likelihood of deterring the state police so that it outweighs the societal costs imposed by the exclusion." 428 U.S.

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9. We note that attachment by its very nature confers extraordinary "benefits" on the plaintiff, and for this reason is permitted only when the moving party has satisfied the burdensome prerequisites of M.R.Civ.P. 4A. Thus, the "benefit" plaintiff acquired by the attachment and of which the defendant complains is no more than is permitted by the rule even though it may be distasteful to the defendant.

at 454. Although this case does not involve exclusion of evidence from the civil proceedings, we find the reasoning of Janis to be persuasive so far as defendant's argument against reinstatement of the attachment order is concerned. If a citizen believes a theft of his or her property has occurred but know that if the evidence is suppressed attachment will not be permitted until the property has been returned to defendant (who by that time will be fully alert to the civil claims and could take measures to thwart an attachment of specific goods), the citizen may well decide that the more prudent course is to initiate civil proceedings rather than report the crime to the police. Defendant has not argued that the police will be deterred from engaging in illegal seizures if we deny the plaintiff relief, and we agree that

such a ruling will not have any effect on the police. We therefore conclude that the application of some variation of the exclusionary rule to this proceeding is not warranted.

VII. DISSOLUTION OF THE ATTACHMENT AND CONSENT JUDGMENT

Plaintiff's primary contention is that the presiding justice abused his discretion in dissolving the orders relating to the consent judgment and attachment. We find, however, that there was no abuse of discretion because the presiding justice clearly was not exercising his discretion when he ordered the tourmalines returned to the Sweatts and dissolved all court orders barring such return. At the May 15 adversary hearing on defendant's motions to release the gems, the justice stated "It is really a question of a conflict between a civil

order and the Supreme Court's mandate [in State v. Sweatt], and I think at this point it is appropriate that the mandate be carried out." Our review of the record of the hearing requires us to conclude that the presiding justice believed the order of this Court in State v. Sweatt was dispositive of the issues before him on May 15. Therefore, his decision was one of law rather than an exercise of discretion and must be reviewed for errors of law.

We did not, in State v. Sweatt, order the tourmaline returned to the Sweatts in contravention of civil claims which had been asserted against it. Our opinion states that "where the suppressed evidence is neither contraband by force of law nor stolen property nor evidence of a crime, it must be returned to the movant absent an adverse claim of ownership", and that

"no third-party claim has been advanced". (emphasis added) 427 A.2d at 951. Plumbago was not a party to the suppression hearing or the appeal in State v. Sweatt, and therefore we could not have ruled on its claims of title to the tourmalines. In fact, we expressly ruled that other claims were not before us. The presiding justice misread our opinion and read too much into our mandate, which stated: "Remanded for entry of an order suppressing all property seized and directing its prompt return to the movants." 427 A.2d at 951.

We can find no evidence in the record suggesting that the court below gave consideration to any other grounds advanced by defendant for vacating the pertinent orders, or to any of plaintiff's arguments. In the absence of such evidence, we are compelled to find that the presiding justice erred as a matter of law in ruling that he was bound by the State v. Sweatt

decision to order the consent judgment and attachment dissolved. We vacate the May 15 order.

We now address whether or not equity demands a reinstatement of the attachment and return of the attached property to the Cumberland County Deputy Sheriff who originally attached "one black footlocker and its contents". The attachment was granted after a Superior Court justice had determined that "there [was] a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above the aggregate of any liability insurance. . . ." M.R.Civ.P. 4A(c). Plaintiff was and is entitled to the benefits of the attachment which would be available to satisfy a favorable judgment should such be obtained in the

conversion action. It is only fair and equitable that the parties be returned to the status which existed immediately prior to the order vacating the attachment. We therefore order the attachment reinstated.

We also find that the consent judgment should not have been dissolved or vacated by the presiding justice on May 15, 1981. Consent judgments cannot be modified or vacated absent a claim of fraud or mistake by the consenting party. Cf. Swift & Co. v. United States, 276 U.S. 311 (1928) (consent to a decree constitutes a waiver of legal defects in such decree); Thompson v. Perkins, 57 Me. 290 (1869) (party cannot appeal from final judgment to which he consented). The lower court's reliance on State v. Sweatt was, as we have stated, misplaced and could not support an order modifying the consent judgment in any way. The lower court erred as a matter of law in vacating the consent

judgment. We therefore order reinstated the consent judgment of January 20, 1981 entered in the FED action.

We further order defendant Dale Sweatt to return the black footlocker and its contents as of May 19, 1981, to the Deputy Sheriff of Cumberland County who had custody of the property under the attachment. Such a mandate leaves the defendant in the same legal position he was in prior to the dissolution of the attachment. The entry is:

> Motion to dismiss consolidated appeals denied.
>
> Appeal in State v. Sweatt, Law-81-192 denied.
> Judgment affirmed.
>
> Appeal sustained in Law-81-203, Plumbago Mining Corp. v. Sweatt, et al.
>
> Remanded to Superior Court with instructions to vacate the order of May 15, 1981, to reinstate the attachment order dated April 17, 1981, and consent judgment order dated January

15, 1981; and to order defendant Dale Sweatt to return to Deputy Sheriff Stanley Fulton the property attached pursuant to the April 17, 1981 Superior Court order.

All concurring.

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.

FILED
JUL 26 1982
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Docket No. 81-2222

THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DALE AND CAROL SWEATT

Petitioners

v.

PLUMBAGO MINING CORPORATION

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Counsel for Respondent:

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QUESTION PRESENTED

Will police conduct in violation of the Fourth Amendment be deterred if victims of theft are prevented from having full and complete access to civil proceedings against the thief because of that unlawful police conduct?

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United States (1886-1976)
76 Mich.L.Rev. 184 (1977) 18

STATEMENT OF THE CASE

In[1] October and November of 1980, the Maine State Police conducted a series of searches of the property of

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1 Respondent has prepared its own version of the Statement of the Case because the Petitioners' version is deficient. In particular Petitioner does not discuss the consent Judgment Respondent obtained securing the tourmaline. Likewise Petitioner makes mistatements of fact. He refers to "Plumbago's misconduct" and "illegality". Petition at 3 and 10. He also complains that the State Police were "manipulated" and that there was "concerted official and private misconduct". Petition at 7. No court has ever made a finding that Respondent has engaged in misconduct, manipulation or illegality; after all, Respondent merely reported a sizeable embezzlement of its property to the State Police and cooperated in the investigation by the State Police.

the Petitioners[2] and seized what Respondent has alleged to be in excess of $250,000 worth of its tourmaline. Tourmaline is a gem stone that is found in Newry, Maine, where the Respondent operates a mine. Petitioner Dale Sweatt was, in 1972, one of the discoverers of the mine, one of the original shareholders of the Respondent, and one of Respondent's employees from its inception until 1975.

Soon after the search the Petitioner filed a motion to suppress the tourmaline. The search was conducted

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[2] Only Petitioner Dale Sweatt is or has been a party to this case, Plumbago Mining Corp. v. Sweatt, now reported at 444 A.2d 361 (Me. 1982). Respondent does not cross petition from a decision adverse to it in the second appeal of State v. Sweatt, a companion case below. In that case both Mr. and Mrs. Sweatt were parties.

with a warrant based on affidavits prepared by the State Police; the affidavits were in part based on information provided by one of the officers of the Respondent.

While the motion to suppress was pending, Respondent brought the first of two civil actions against the Petitioner.[3] That action sought, by a statutory procedure entitled Forcible Entry of Personal Property, to recover the tourmaline that the

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[3] A chronological appendix which was part of Respondents Brief below is attached for the convenience of the Court.

Petitioner allegedly stole from the Respondent. See 14 MRSA §6012. A temporary restraining order was issued after notice and hearing. That order restrained the State Police from returning the tourmaline to the Petitioner.

The Respondent filed a second civil action against the Petitioner. This action sought $1,000,000 in damages for conversion of both the tourmaline that had been seized and other tourmaline which the Respondent alleged had already been sold by the Petitioner and converted into cash or other assets.

Petitioner's motion to suppress was granted and the State of Maine appealed. Two days after the oral argument in the Maine Supreme Judicial

Court on the State's appeal, the parties agreed to the entry of a consent judgment in the FED case. The crucial provision of that judgment read:

> 3. Defendants White and Ouellette [two State Policemen] have no right, title or interest in the property in question other than as custodians. They shall retain the property in question until any pending criminal proceedings involving defendants Sweatt or Austin have terminated in the Superior Court (initials omitted). If this civil action is pending at that time they shall continue to hold it until the entry of any Final Judgment.

Thereafter on March 31, 1981, the Maine Supreme Judicial Court affirmed the order of the Superior Court in the suppression case. Its decision turned

on the content of the affidavits supporting the search warrants. State v. Sweatt, 427 A.2d 940 (Me. 1981).[4]

After several hearings, the first on January 19, 1981, and the submission of numerous affidavits, on April 21, 1981, the Superior Court entered an order in the conversion case allowing the Respondent to attach up to $1,000,000 of the Petitioner's

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[4] This was the first appeal in State v. Sweatt. Thereafter Respondent sought, unsuccessfully, to intervene in that case on remand in order to prevent return of the tourmaline to the Sweatts. The second appeal in State v. Sweatt resulted in a holding that Respondent could not intervene. 444 A2d at 366-367.

assets.[5] On April 27, 1981, Respondent effectuated the attachment, by attaching the tourmaline which the State Police had earlier seized and which was still in the custody of the State Police.

On May 15, 1981, the Petitioner secured an order from the Superior Court vacating the consent judgment in the FED case and vacating that portion of the attachment effecting the tourmaline in the conversion case. The Superior Court did not write an opinion but its ruling left no doubt that it based its opinion

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5 Therefore, contrary to the assertions by Petitioner at 6 of his Brief, there was no violation of the rule requiring a pre-attachment hearing originally articulated by this Court in Fuentes v. Shevin, 407 U.S. 67 reh. denied 409 U.S. 902 (1972).

solely on the language of the mandate of the Maine Supreme Judicial Court in the first appeal of State v. Sweatt, supra.[6] Plumbago v. Sweatt, supra at 370.

Respondent appealed. The State Police returned the tourmaline to the petitioner.

Ultimately, the Respondent was successful on its appeal. Plumbago v. Sweatt, supra. The mandate of the Maine Supreme Judicial Court read as follows:

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[6] The mandate read in pertinent part, "Remanded for an entry of an order suppressing all property seized and directing its prompt return to the movants." 427 A.2d at 951.

> Remanded to Superior Court with instructions to vacate the order of May 15, 1981, to reinstate the attachment order dated April 17, 1981, and consent judgment order dated January 15, 1981; and to order defendant Dale Sweatt to return to Deputy Sheriff Stanley Fulton the property attached pursuant to the April 17, 1981 Superior Court Order.

Id. at 371.

Petitioner has failed to fully obey the Order requiring the return of the tourmaline. See Appendix B.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THIS CASE IS OF LITTLE IMPORTANCE TO THE DEVELOPMENT OF THE LAW OF SEARCH AND SEIZURE.

There appear to be no reported cases in this Court or in any other addressing the specific question raised by this

case. Petitioner has cited none and Respondent's research has disclosed none. The closest cases on point in this Court are United States v. Janis, 428 U.S. 433, reh. denied 429 U.S. 874 (1976) and United States V. Calandra, 414 U.S. 338 (1974).

Those cases both support respondent's position: It should not be penalized because the state police prepared faulty affidavits and a state district court judge approved a search warrant based on those affidavits. Janis was relied on by the Court below. Plumbago v. Sweatt, supra at 369-370. As this case is sui generis there is no reason for this Court to grant the Petition and consider a question that is unlikely to be presented again.

II. PETITIONERS' ARGUMENTS ARE WITHOUT MERIT AND ARE FORECLOSED BY PRIOR OPINIONS OF THIS COURT.

The exclusionary rule prevents the admission of illegally seized evidence in a criminal prosecution. The most relevant Fourth Amendment law for this case is found in Janis and Calandra, supra. From those two cases one may establish the following principles. First, the primary, if not sole, purpose of the exclusionary rule is to deter unlawful police conduct. U.S. v. Janis, supra, at 446; U.S. v. Calandra, supra, at 347. Second, application of the exclusionary rule in a proceeding other than the prosecution for which the evidence was seized will depend on the result of a balancing test: The

deterrent effect of suppression in the non-criminal proceeding is balanced against the "societal costs imposed by the exclusion." U.S. v. Janis, supra, at 454.

The societal cost, if the rule is applied here, is the denial to an innocent civil plaintiff of pre-judgment security and no doubt, the use of critical evidence at trial. The deterrent effect of application is illusory. The state police have already been deterred by the decree in State v. Sweatt, 427 A2d 940 (Me. 1981).

In Calandra, this Court held that exclusion of wrongfully seized evidence would not be ordered in a grand jury proceeding investigating the defendant because

> it is unrealistic to assume that application of the [exclusionary] rule to grand jury proceedings would significantly further that goal [of deterring unlawful police conduct]. U.S. v. Calandra, supra at 351.

In Janis, the Court held that exclusion would not be ordered in a civil action brought by the federal government to collect unpaid taxes when the evidence in question had been seized by state officials to further a state prosecution for unlawful gambling.

> In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. U.S. . Janis, supra at 454.

The facts of Janis are somewhat similar to those here and its holding should apply here. Money and gambling paraphernalia were seized by the Los Angeles Police from Mr. Janis. The government was advised of possible tax consequences. The government made an assessment[7] against Mr. Janis and levied on the money. Janis moved to

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[7] Assessments are liens against the taxpayers' property from the time of the assessment. 26 USC §§6321 and 6322. Indeed, in other situations the same government that made the unlawful search has been allowed to assert a tax lien on the seized property or defeat a motion for its return. Field v. U.S., 263 F.2d 758, 760, 762 (5th Cir.), cert denied 360 U.S. 918 (1959); City of Boston v. Ditson, 348 NE2d 116, 125 (Mass. App. 1976), app. dis. 429 U.S. 1057 (1977). Ditson applied the Calandra balancing test in upholding a tax lien imposed as a result of an unlawful search. Id. at 123.

suppress in the Los Angeles Municipal Court; the motion was granted. The Municipal Court, noting the IRS lien on the money, did not order it returned.

Janis then filed a refund suit in the District Court and the IRS counterclaimed. During pretrial Janis moved to suppress the evidence the Los Angeles Police had seized -- which was the basis of the government's case -- and to quash the assessment. The motion was granted and that decision affirmed by the Ninth Circuit. Id. at 434-439. This Court reversed.[8]

In the course of its opinion this

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[8] Although not discussed, it seems clear that the Order quashing the assessment was also reversed.

Court took note of (but did not resolve) the problem of "intrasovereign" violations. Id. at 456.[9] Such a problem might arise here if the State, relying on the tourmaline that was unlawfully seized by the State Police, sought to recover unpaid income taxes from Mr. Sweatt.

In Janis there was no discussion of the likely result if a private party took the place of the other sovereign there occupied by the IRS: that is the situation in this case. Thus, the

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[9] This Court looked to cases like State v. Caron, 334 A.2d 495 (Me. 1975) where the Court below, using the Calandra balancing test, did not apply the exclusionary rule in probation revocation proceedings. U. S. v. Janis, 428 U.S. 433, 456 (1976).

question at issue is whether the release of the tourmaline from attachment and the consent Judgment, will deter the state police from preparing and State court judges from approving search warrants based on insufficient affidavits.

The answer to that question is "No". The Maine Supreme Judicial Court was correct in ruling as it did. But if the Court below was wrong then a private citizen faced with a theft of the magnitude alleged here and any likelihood of a civil recovery from the thief will never go to the police for fear "the constable will blunder" and, as a result, he or she will be unable to recover their property. Since the answer to the question presented is

"no", the Court below was correct.

The case on which Petitioner most heavily relies here, and on which he relied in the courts below, is Boyd v. United States, 116 U.S. 616 (1886). Petition at 9. Respondent found and still finds that reliance astonishing as Boyd was overruled sub silentio by this Court in 1975. Fisher v. United States, 425 U.S. 391, 407 (1976).[10] Note, The Life and Times of Boyd v. United States (1886-1976), 76 Mich.L.Rev. 184, 203-212 (1977).

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[10] On page 5 of his petition, the Petitioner argues that he has no remedy for the unlawful search and seizure. He already has had his remedy. The evidence has been suppressed and he was neither prosecuted nor convicted.

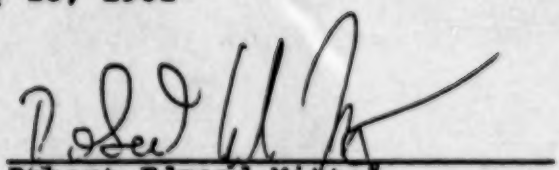
Unlawfully seized evidence is subject to assessment of a lien and is admissible in civil proceedings, Janis; it is admissible in grand jury proceedings, Calandra; it is admissible in probation revocation proceedings, Caron; and it is admissible for some impeachment purposes in the very trial for which it was seized, United States v. Havens, 446 U.S. 620, reh. denied 448 U.S. 911 (1980). The Maine Supreme Judicial Court correctly interpreted the precedent of this Court.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari to the

Supreme Judicial Court of Maine should be denied.

Dated: July 23, 1982



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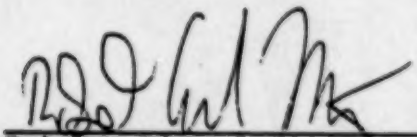
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Robert Edmond Mittel, attorney for Respondent, hereby certify that three copies of Respondent's Brief in Opposition to Petition for a Writ of Certiorari have been mailed, this date, postage prepaid, first class mail, to Arthur L. LaFrance, attorney for Petitioners.

Dated: July 23, 1982



Robert Edmond Mittel

APPENDIX A

CHRONOLOGY

DATE	EVENT PLEADING OR ORDER	CASE	COURT AND DOCKET NO.
Nov. 14, 1980	First day of Suppression Hearing	Suppression	Ox. Crim. 80-291
Nov. 20, 1980	Complaint filed; motion for TRO heard and granted - State Police to hold tourmaline until conclusion of "this proceeding"	FED	Dist. XII, Cv. 79-80-C288
Nov. 21, 1980	Second day of suppression hearing	Suppression	Ox. Crim. 80-291
Nov. 26, 1980	Suppression ordered	Suppression	Ox. Crim. 80-291
Dec. 15, 1980	Complaint filed	Conversion	Ox. Civ. 80-204
Jan. 12, 1981	Oral argument	Suppression	Law Ct. Ox. 80-23
Jan. 15, 1981	Consent Judgment	FED	Dist. XII Cv. 79-80 C288
Jan. 19, 1981	Hearing on Attachment Motion	Conversion	Ox. Civ. 80-204
Feb. 17, 1981	Motion for attachment Granted	Conversion	Ox. Civ. 80-204
Feb. 18, 1981	Verified Answer of Defendant Filed	Conversion	Ox. Civ. 80-204
Feb. 26, 1981	Case Entered in Superior Court	FED	Ox. Civ. 81-35
Mar 2, 1981	Entry of $1,000,000 Attachment Order of February 27	Conversion	Ox. Civ. 80-204
Mar. 12, 1981	Defendant Moves to Stay Attachment	Conversion	Ox. Civ. 80-204
Mar. 23, 1981	Order reducing Attachment to $250,000 etc.	Conversion	Ox. Civ. 80-204

DATE	EVENT PLEADING OR ORDER	CASE	COURT AND DOCKET NO.
Mar. 31, 1981	Law Court Mandate Entered	Suppression	Ox. Crim. 80-291
April 13, 1981	Plumbago Motion to Intervene Filed; Notice of Appeal Filed	Suppression	Ox. Crim. 80-291
April 16, 1981	State Motion for Rehearing Heard	Suppression	Law Ct. Ox. 80-23
April 21, 1981	Order Reinstating Attachment at $1,000,000 Entered	Conversion	Ox. Civ. 80-204
April 21, 1981	State Motion for Rehearing Denied	Suppression	Law Ct. Ox. 80-23
April 27, 1981	Tourmaline Attached	Conversion	Ox. Civ. 80-204
April 28, 1981	Tourmaline to be Returned; Order limited to Suppression Case	Suppression	Ox. Crim. 80-291
April 29, 1981	Plumbago Motion For Stay and To Intervene Denied	Suppression	Ox. Crim. 80-291
May 4, 1981	Defendant's Motion to Release Attachment Filed	Conversion	Ox. Civ. 80-204
May 4, 1981	Defendant's Motion to Dissolve TRO Filed	FED	Ox. Civ. 81-35
May 5, 1981	Plumbago Notice of Appeal Filed	Suppression	Ox. Crim. 80-291
May 15, 1981	Hearing held on Defendant's Motions re TRO and Attachment; Entry of Order Vacating TRO, Consent Judgment and Releasing Tourmaline From Attachment and Enforcing Suppression Mandate; Plumbago Motion for Stay Denied	Conversion, FED Suppression	Ox. Civ. 80-204 Ox. Civ. 81-35 Ox. Crim. 80-291

DATE	EVENT PLEADING OR ORDER	CASE	COURT AND DOCKET NO.
May 18, 1981	Hearing on Plumbago Motion for Stay of May 15 Order in Conversion and FED Cases	Conversion FED	Law Docket Law 81-203
May 19, 1981	Plumbago Notices of Appeal Filed	Conversion FED	Ox. Civ. 80-204 Ox. Civ. 81-35
May 19, 1981	Tourmaline Removed From Eagle Savings	Conversion FED Suppression	Ox. Civ. 80-204 Ox. Civ. 81-35 Ox. Crim. 80-291
May 22, 1981	May 15 Superior Court Orders Stayed	Conversion FED	Law Docket Law 81-203

APPENDIX B

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May 26, 1982

Hon. Louis Scolnik
Justice, Superior Court
Androscoggin County Courthouse
Turner Street
Auburn, Maine

Re: Plumbago Mining Corp. v. Dale Sweatt, et als
Civil Action Docket Nos. 80-204 and 81-35

Your Honor:

This is a joint report that counsel have prepared on the return of the tourmaline in the above-captioned cases. Each item in each inventory prepared at the time of the seizure by the State Police was retrieved from a box or a bag, tentatively identified by Officer Maurice Ouellette, and given a new lot number. The lot was then photographed and a description prepared by the photographer who appears to be knowledgeable in the gem business.

As was indicated to Your Honor during our telephone conference on Monday, certain items inventoried by the State Police as returned to Mr. Sweatt on May 19, 1981, were not returned. Those items appear to be the following:

1. Items 2 - 9, 12 - 19 and 21 - 24 of the "Lampost Inventory";

2. Portions of "Evidence marked #1" of the Austin Office inventory;

3. Portions or all of "Evidence marked #2" of the Austin inventory; and

4. Portions or all of "Evidence marked #3" of the Austin inventory.

It should also be noted that the last inventory that we reviewed was the inventory of 10/9/80 from Dale Sweatt's office. We had insufficient time to do a detailed count, but it appears that all items A-1 through A-8 are present.

The material is in two footlockers in the vault at the Maine National Bank and should be attached within the next day or so.

Sincerely yours,

Robert Edmond Mittel
Attorney for Plaintiff

Howard H. Dana, Jr.
Attorney for Defendant Sweatt

prm